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in the

Supreme Court

of the

United States

OCTOBER TERM 1974

No. 74-876

IOANA DRAGANESCU, et al.,

Petitioners,

vs.

FIRST NATIONAL BANK OF HOLLYWOOD

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
CONCLUSION	6
CERTIFICATE	7

TABLE OF CITATIONS

Case	Page
French v. Hall, 119 U. S. 152	4, 5
Travelers Ins. Co. v. Dykes, 395 F.2d 747	4

OTHER AUTHORITIES

United States Supreme Court Rule 19	5
United States Supreme Court Rule 23	5
United States District Court, Southern District of Florida Rule 14 C	3

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OPINIONS BELOW

The opinion of the District Court is unreported. A portion of the District Court's opinion is included in the Petitioners' appendix but there are substantial omissions

of portions of that opinion. In addition, the Petitioners requested the District Court to reconsider or modify its original opinion and although that request was denied the District Court did write a further opinion on the issues involved but that opinion is omitted in total from the Petitioners' appendix.

The opinion of the Court of Appeals is found at 502 F.2d 550 (1974), and is reprinted in full in the Petitioners' appendix.

JURISDICTION

The Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C., Section 1254(1). The Respondent believes that this Court lacks jurisdiction because none of the well recognized grounds for granting certiorari are present.

QUESTION PRESENTED

MAY A TRIAL JUDGE IN THE EXERCISE OF HIS DISCRETION REMOVE ONE OF THE PLAINTIFFS' ATTORNEYS PRIOR TO TRIAL WHERE THAT ATTORNEY ANNOUNCES HIS INTENTION TO BE A MATERIAL WITNESS FOR THE PLAINTIFFS AT AN ENSUING JURY TRIAL.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petitioners filed suit against the First National Bank of Hollywood, Florida, a National Banking Corporation and a former employee for the negligent failure to prepare a will. The action was filed for the Petitioners in the United States District Court for the Southern District of Florida by John R. Vintilla, Esquire, of Cleveland, Ohio. Thereafter, William E. Allison, Esquire, of St. Petersburg, Florida, filed an appearance as additional counsel for the Petitioners. After that, John Carlon, Esquire, of Fort Lauderdale, Florida, filed an appearance as further additional counsel for the Petitioners.

Pursuant to Rule 14-C of the local Rules of the United States District Court for the Southern District of Florida Mr. Carlon met with Respondent's counsel and prepared a pre-trial stipulation prior to a pre-trial conference. Thereafter, Mr. Carlon appeared at the pre-trial conference on behalf of the Petitioners.

At the pre-trial conference the District Judge considered the question of whether or not Mr. Vintilla, who was listed as a material witness for the Petitioners in the pre-trial stipulation, could act as trial counsel and also be a material witness. The trial Judge, in the exercise of his judicial discretion, determined that Mr. Vintilla could not be a material witness and act as trial counsel. The District Court Judge instructed Mr. Carlon to act as trial counsel.

Thereafter, Mr. Vintilla moved on behalf of the Petitioners to amend the District Court Judge's pre-trial order so as to permit himself to act as trial counsel and be a material witness for the Petitioners. The District Court

Judge denied this request in a written opinion, a copy of which has not been included by the Petitioners in their appendix.

On appeal, the District Court Judge's decision was unanimously affirmed by the District Court of Appeals for the Fifth Circuit. A Petition for Rehearing was denied and a timely Petition for Certiorari was filed by the Petitioners with this Court.

ARGUMENT

The Petition is much ado about nothing, namely the trial court's exercise of its judicial discretion in disqualifying one of the Petitioners' three attorneys of record from acting as trial counsel where he was to give material testimony for the Petitioners.

A decision on an issue such as this must be based on the facts of each particular case and the trial court's discretion in deciding the issue must be given substantial weight and credibility. The broadly recognized principle that the trial judge is vested with considerable discretion is well recognized. *French v. Hall*, 119 U.S. 152; *Travelers Ins. Co. v. Dykes*, 395 F.2d 747. No rule could be enunciated by this court which could be a guide to future litigants and courts since the discretion of the trial judge to govern matters such as this must be decided on a case by case basis.

The Petitioners have not asserted a conflict between the decision in this case and any other decision of this court nor have they asserted any conflict between this decision and the decisions of the various courts of appeal. Like-

wise, they have not suggested that any important question of Federal Law is at issue. It is evident that there is no important statutory or constitutional issues involved. In fact, none of the well recognized grounds for granting certiorari are present. See Supreme Court Rule 19.

When all is said and done we come back to one simple point, namely that the trial Judge was vested with certain discretion and there has been no showing that he abused that discretion. In fact, the Circuit Court did ". . . not believe that Vintilla's removal will work a substantial hardship."

As was noted by this Court in *French v. Hall*, supra, it is "unseemly" for counsel in a civil action to testify for his client especially if he is in a position to comment on his own testimony, which would be the case here since the Petitioners requested trial by jury. This Court clearly indicated that this practice should properly be discouraged.

Finally, the Petitioners have omitted substantial portions of the trial court's pre-trial order disqualifying Mr. Vintilla from acting as trial counsel. Further, they have failed to include in their appendix the trial court's opinion with regard to their request for reconsideration or modification of the pre-trial order. This failure alone is sufficient grounds for denial of the petition. See Supreme Court Rule 23, paragraph 4.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHIRLEY Z. LUBETKIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to the Petition for Certiorari was delivered by mail to JOHN R. VINTILLA, 550 Hanna Building, Cleveland, Ohio 44115, Attorney for Petitioners, this ____ day of _____, 1975.

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By:_____
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